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IN THE

Supreme Court of the United States

HUMBERTO FIDEL REGALADO CUELLAR,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

AMICUS CURIAE BRIEF OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

JEFFREY T. GREEN
SIDLEY AUSTIN LLP
1501 K Street, NW
Washington, DC 20005
(202) 736-8000

CRAIG D. SINGER
(Counsel of Record)
JOHN E. CLABBY
CHRISTOPHER R. HART
DAVID A. TAYLOR
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, NW
Washington, DC 20005
(202) 434-5000

Attorneys for Amicus Curiae National Association of Criminal Defense Lawyers.

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

Whether merely hiding funds with no design to create the appearance of legitimate wealth is sufficient to support a conviction for money laundering under 18 § U.S.C. § 1956(a)(2).

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INTEREST OF AMICUS CURIAE[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit organization with direct national membership of over 11,500 attorneys, in addition to more than 28,000 affiliate members from all 50 states. Founded in 1958, NACDL is the only professional bar association that

[1] Pursuant to Supreme Court Rule 37.6, counsel for amicus states that no counsel for a party authored this brief in whole or in part, and that no person other than amicus, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

represents public defenders and private criminal defense lawyers at the national level. The American Bar Association recognizes NACDL as an affiliated organization with full representation in the ABA House of Delegates. NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of criminal justice, including issues involving the Bill of Rights. Consistent with these goals, NACDL has previously criticized illogical and improper judicial expansions of the money laundering statute at issue in this case, 18 U.S.C. § 1956.[2] Amicus also highlighted the legal problems and practical consequences of expansive interpretations of § 1956 in its brief in support of Respondents in *United States v. Santos*, No. 06-1005, for which this Court held oral argument on October 3, 2007.

INTRODUCTION

Amicus agrees with Petitioner that merely hiding funds with no design to create the appearance of legitimate wealth is insufficient to support a money laundering conviction. Amicus submits this brief to elaborate on the reasons why, in its view, the expansive interpretation of the "conceal or disguise"

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[2] *See* NACDL Money Laundering Task Force, Proposals to Reform the Federal Money Laundering Statutes (Aug. 1, 2001), *available at* http://www.nacdl.org/public.nsf/legislation/CI_01_018?opendocument (last visited Dec. 13, 2007).

clause of the principal federal money laundering statute, 18 U.S.C. § 1956(a), given by some courts of appeals conflicts with the plain language and meaning of that statute. Amicus writes principally to explain how the increased and continued expansion of the money laundering statute has real and detrimental effects on the rights of criminal defendants and on the enforcement of the money laundering statutes.

The expansive and unwarranted interpretation adopted by the Fifth Circuit below, and by the Second, Third, and Eleventh Circuits in analogous circumstances, improperly expands the scope of an already broad statute far beyond its intended reach. Section 1956 has become a vehicle for increasing potential sentences substantially in excess of what otherwise would be permissible for the underlying conduct, without any showing of the aggravated societal harm that the money laundering statute was designed to redress. If this over-expansive interpretation is allowed to stand, criminal defendants unjustly will face longer sentences and will be forced to weigh the potential for such sentences in considering whether to plead guilty.

These grave concerns regarding the scope of the money laundering statute militate strongly in favor of reversal. Amicus respectfully requests that this Court restore the meaning of "conceal or disguise" in § 1956 to that which the statutory language supports and which Congress intended.

ARGUMENT

I. THE FIFTH CIRCUIT'S INTERPRETATION OF "CONCEAL OR DISGUISE" EXPANDS 18 U.S.C. § 1956 BEYOND CONGRESS'S INTENT AND FOSTERS UNJUST RESULTS.

A. The Money Laundering Statute Is Subject to Expansive Interpretations That Invite Prosecutorial Over-Reliance.

The Money Laundering Control Act of 1986 ("MLCA"), *codified at* 18 U.S.C. §§ 1956–1957, was the first federal statute to criminalize money laundering per se. *See* Adam K. Weinstein, Note, *Prosecuting Attorneys for Money Laundering: A New and Questionable Weapon in the War on Crime*, 51 Law & Contemp. Probs. 369, 372–73 (Winter 1988). As enacted, the MLCA was and is a powerful tool for prosecutors. Compared with RICO and various criminal conspiracy statutes, prosecutors can bring cases relatively easily under § 1956, and its long list of predicate offenses facilitates convictions.[3] *See, e.g.*, Norman Abrams & Sara Sun Beale, *Federal Criminal Law and Its Enforcement* 397 (3d ed. 2000).

Although the scope of the MLCA was broad when enacted, many courts since have interpreted

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[3] Section 1956(c)(7) provides a lengthy list of offenses that qualify as "specified unlawful activity," including the definition of racketeering found in § 1961(1) (which includes, *inter alia*, mail and wire fraud).

the statute to capture conduct substantially beyond traditional money laundering. *See* Scott J. Golde & Winston E. Calvert, *A Practioner's Guide to the Federal Money Laundering Statutes*, 62 J. Mo. B. 312, 312 (2006) ("The federal statutes not only cover the classic money laundering scenario where an individual takes steps to make illegally earned assets appear legitimate, they also affect a far broader range of conduct that many would not consider 'laundering' money."); Sally Baghdasarian, Note, *Gatekeepers: How the Broad Application of Anti-Money Laundering Statutes and Strategies May Open an Attorney's Gates to Prosecution*, 32 Sw. U. L. Rev. 721, 723 (2003) ("The scope of the MLCA can be rather broad. In fact, the statute can reach so far as to impose liability on individuals, such as attorneys, who were not originally involved in any illegal activity, but later became involved in post-illegal activity." (footnote omitted).

Prosecutors accordingly may seek to "tack on" money laundering charges where the alleged "laundering" conduct is incidental to or virtually indistinguishable from the underlying offense. More broadly, they may seek to use the money laundering statutes to punish conduct well beyond those statutes' proper realm. *See* Mariano-Florentino Cuellar, *Criminal Law: The Tenuous Relationship Between the Fight Against Money Laundering and the Disruption of Criminal Finance*, 93 J. Crim. L. & Criminology 311, 406 (2003) ("People committing federal offenses that can be predicates for money laundering (such as drug trafficking), for example, can now be charged with money laundering for doing almost anything in the world with money from

specified unlawful activity, because of the watered down interpretations of the anti-money laundering statutes."); *see also* Ellen S. Podgor, Book Review, *Money Laundering and Legal Globalization: Where Does the United States Stand on This Issue?*, 5 Wash. U. Global Stud. L. Rev. 151, 152 (2006) ("While being a leader in fighting money laundering activity, the U.S. Department of Justice has used new statutes creatively to expand prosecutorial power beyond its intended purpose."). So broad is the money laundering statutes' potential scope that legitimate conduct may be threatened. *See* Larry D. Thompson & Elizabeth Barry Johnson, *Money Laundering: Business Beware*, 44 Ala. L. Rev. 703, 723 (1993) ("[A]dditional guidelines are needed to prevent overzealous prosecutors from misapplying the statutes and to ensure that corporations are not deterred from entering into legitimate business transactions.").

B. Many Courts Consistently Have Expanded Specific Terms of 18 U.S.C. § 1956, Encouraging Broad, Unintended, and Unfair Applications of the Statute.

As Petitioner's brief demonstrates, the principal federal money laundering statute, 18 U.S.C. § 1956, and in particular its "conceal or disguise" prong,[4] have been interpreted more broadly than Congress intended. *See* Pet'r Br. 28–32.

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[4] A defendant may be convicted under § 1956(a)(1) or (a)(2) if it is shown, *inter alia*, that the defendant knew the transaction, (a)(1), or the international transportation, (a)(2), was "designed in whole or in part—to conceal or disguise the nature, the

"Conceal or Disguise." Many courts—including the Fifth Circuit in the decision below—have adopted extraordinarily expansive constructions of the phrase "conceal or disguise," interpreting it to encompass the mere hiding of funds.

For example, the Second Circuit recently upheld the money laundering conviction of the owner of an armored-car business for transportation of cash, without evidence that the cash transportation was designed to give the appearance of legitimate wealth. *United States v. Ness*, 466 F.3d 79, 81 (2d Cir. 2006), *petition for cert. filed*, June 1, 2007 (No. 06-1604); *see also United States v. Elso*, 422 F.3d 1305 (11th Cir. 2005) (attorney's placement of client's illicitly-obtained cash into personal briefcase, which he attempted to transport by car to his law office, satisfied concealment prong); *United States v. Hurtado*, 38 F. App'x. 661 (2d Cir. 2002) (facts indicating only that money being transported into the United States was hidden in luggage bags, without evidence that the transportation was meant to make the money appear legitimate, sufficed to show a violation of § 1956). Some courts also have found the "conceal" element satisfied when the defendant has done no more than commingle the proceeds of lawful and unlawful activity in a single bank account. *See United States v. Posters 'N'*

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location, the source, the ownership, or the control of the proceeds of specified unlawful activity." *See also* §1956(a)(3)(B).

Things Ltd., 969 F.2d 652, 661 (8th Cir. 1992), (deposit by "head shop" owner of shop proceeds into business account), *aff'd on other grounds*, 511 U.S. 513 (1994); *United States v. Sutera*, 933 F.2d 641, 648 (8th Cir. 1991) (deposit of gambling proceeds into family business account bearing defendant's name); *see also United States v. Shepard*, 396 F.3d 1116, 1121 (10th Cir.) ("[D]epositing illegal proceeds into the bank account of a legitimate business may support the inference of an intent to conceal."), *cert. denied*, 545 U.S. 1110 (2005).

"Financial Transaction." The breadth with which some courts have construed the term "conceal" is illustrative of a larger trend among the federal courts to interpret provisions in § 1956 in an expansive fashion. For example, to be convicted under § 1956(a)(1), a defendant must have conducted a "financial transaction," which § 1956(c)(4) defines as "a transaction which in any way or degree affects interstate or foreign commerce" involving, *inter alia*, "the movement of funds by wire or other means." Some courts have construed the phrase "or other means" to be virtually unlimited. *See, e.g.*, *United States v. Reed*, 77 F.3d 139, 143 (6th Cir. 1996) (delivery of money to courier "involved the movement of funds by wire or other means" (alteration and quotation omitted); *United States v. Wydermyer*, 51 F.3d 319, 326–27 (2d Cir. 1995) ("physical transportation of money out of the United States by hand" is a financial transaction by "other means"); *United States v. Dimeck*, 24 F.3d 1239, 1246 (10th Cir. 1994) (noting that physical delivery of cash is "movement of funds by wire or other means" (emphasis and quotations omitted).

According to one commentator, such interpretations have "the potential to extend the reach of the money laundering statute to any movement of property and greatly expand its scope." 1 John K. Villa, *Banking Crimes* § 8:10 at 8–33 (2007). Another commentator expressed a similar concern:

> The continuing trend toward widening what is meant by financial transaction gives prosecutors ever more leeway in deciding when to use § 1956, because the occurrence of some kind of financial transaction is what triggers liability under the statute. In short, the pattern is that interpretations have become more draconian over time.

Cuellar, *supra*, at 348.

"Proceeds." As an additional element of a money laundering offense, § 1956(a)(1) requires proof that the defendant knew the property involved in the financial transaction was the *proceeds* of specified unlawful activity. Although the statute does not define this term, some courts have interpreted it broadly. *See United States v. Haun*, 90 F.3d 1096, 1101 (6th Cir. 1996) (defining "[p]roceeds" as "what is produced by or derived from something (as a sale, investment, levy, business) by way of total revenue." (quotations omitted)). Contrary to the plain language of the statute, "proceeds" has even been held to include worthless items. *See United States v. Akintobi*, 159 F.3d 401, 403–04 (9th Cir. 1998) (holding that, although the term "may refer to

something of value," it "has the broader meaning of that which is obtained . . . by any transaction," and therefore included checks that "ultimately proved worthless because the accounts backing them up were either empty or closed" (quotations omitted)); *see also United States v. Estacio*, 64 F.3d 477, 480 (9th Cir. 1995), *as amended on denial of reh'g* (noting that courts "define the term broadly," and holding that "proceeds" included a "fraudulently obtained line of credit, which results in an artificially inflated bank balance").

Some circuits also have interpreted "proceeds" to include gross receipts of the specified criminal activity rather than only the net income of that activity; consequently, they construe the statute broadly to prohibit reinvestment of gross receipts as expenses of the criminal enterprise. *See United States v. Iacaboni*, 363 F.3d 1, 4 (1st Cir.), *cert. denied*, 543 U.S. 978 (2004); *United States v. Grasso*, 381 F.3d 160, 169 (3d Cir. 2004), *vacated and rev'd on other grounds*, 544 U.S. 945 (2005), *reinstated in relevant part*, Nos. 03-1441 & 03-1442 (May 20, 2005). *But see Santos v. United States*, 461 F.3d 886, 893–94 (7th Cir. 2006). The Court recently granted certiorari to resolve the circuit split on this issue in *United States v. Santos*, No. 06-1005 (cert. granted Apr. 23, 2007), which was argued on October 3, 2007.[5]

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[5] The oral argument in *Santos* included the following exchange:

> Justice Alito: "Mr. Roberts, isn't it true that the problems that are being highlighted are problems that result from expansive interpretations of other concepts that are not

"Willful Blindness." Additionally, Circuits have interpreted § 1956 as allowing for conviction premised on "willful blindness" to the specified illegal activity. *See United States v. Flores*, 454 F.3d 149, 155–56 (3d Cir. 2006) (holding willful blindness sufficient for conviction); *United States v. Epstein*, 426 F.3d 431, 440 (1st Cir. 2005) (same). *But cf. United States v. Sayakhom*, 186 F.3d 928, 943 n.8 (9th Cir. 1999) (explaining that prosecution must prove more than the defendant "should have known"). *See generally* Tracy Tucker Mann, *Money Laundering: Twenty-Second Survey of White Collar Crime*, 44 Am. Crim. L. Rev. 769, 777–78 (2007) (collecting cases). This despite the statute's plain language requiring actual knowledge of illegality. *E.g.*, 18 U.S.C. § 1956(a) ("Whoever, *knowing* that the property involved in a financial transaction represents the proceeds of some form of unlawful activity . . . ." (emphasis added)); *see* Mann, *supra*, at 777 ("Sections 1956 and 1957 require actual knowledge, which is a more stringent standard than

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before us here, expansive interpretation of promotion, expansive interpretation of concealment? The Seventh Circuit in the first appeal in this case interpreted promotion very broadly. And then, I guess it felt that it had boxed itself in and that's what led to this interpretation of proceeds. But if you interpret those other concepts more narrowly, you don't have the same kind of overlap." Mr. Roberts: "I agree with that, Your Honor."

Transcript of Oral Argument at 7–8, *United States v. Santos* (U.S. Oct. 3, 2007) (No. 06-1005).

'should have known' or 'reckless disregard.' However, some courts have weakened this requirement . . . ." (footnote omitted)).

Through such expansive interpretations of terms that otherwise would appear to limit application of the statute,[6] many courts now punish as "money laundering" conduct that bears virtually no relation to that concept as it is commonly understood. *See United States v. Skinner*, 946 F.2d 176 (2d Cir. 1991) (sale of cocaine sufficient for conviction under the money laundering statute). "[T]he fluidity of the judicial understanding of these concepts means that defenses based on grammar and logic seem . . . doomed to failure." Mary McNamara, Edward W. Swanson, & Alexis Haller, *Money Laundering: How Prosecutors Clean up Under 18 U.S.C. Sections 1956 and 1957*, 26 Forum 61 (1999), *available at* http://www.smhlegal.com/articles/money%20laund.pdf (last visited Dec. 13, 2007). These interpretations raise serious concerns that the power of prosecutors to bring a defendant's conduct within the statute has been unfairly and improperly expanded. "Distinctions in the details of §§ 1956 and 1957 should not obscure the prevailing pattern in

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[6] *See also United States v. Valuck*, 286 F.3d 221, 226 (5th Cir. 2002) (announcing that the Fifth Circuit "subscribes to a broad interpretation of the word 'promote' within the context of section 1956"); *United States v. Leslie*, 103 F.3d 1093, 1100 (2d Cir. 1997) (concluding that *United States v. Lopez*, 514 U.S. 549 (1995), "did not elevate the government's burden under the money laundering statute," and that "[t]he government need only prove that the individual subject transaction has, at least, a de minimis effect on interstate commerce").

the way courts parse the statutes' abstruse terms: with just occasional exceptions, over time the statutes' interpretation has tended to favor prosecutors." Cuellar, *supra*, at 343.[7]

Interpreting "conceal or disguise" consistent with the statutory language and intent would not solve all of these issues, but it would be a step in the right direction of restoring the money laundering statutory scheme to its intended scope.

C. Expansive Interpretations of § 1956 Have Significant Negative Ramifications for the Criminal Justice System.

These concerns are not merely abstract. An overbroad reading of the principal federal money laundering statute has severe consequences for the many criminal defendants accused of violating it, and for the criminal justice system as a whole.[8]

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[7] Compounding the problem, the *United States Attorneys' Manual* imposes limited obligations on prosecutors to notify the Department of Justice before pursuing money laundering charges, "in sharp contrast to even the broadly interpreted and applied RICO statutes which require authorization prior to prosecution under any circumstances." Teresa E. Adams, Notes & Comments, *Tracking on Money Laundering Charges to White Collar Crimes: What Did Congress Intend, and What Are the Courts Doing?*, 17 Ga. St. U. L. Rev. 531, 569 (2000) (citing *U.S. Attorneys' Manual* §§ 9-105.310–.330, 9-110.101).

[8] In the most recent year for which statistics are available, nearly one thousand defendants were convicted under § 1956—62% of all defendants convicted of money-laundering related crimes in the federal system. *See 2007 National Money Laundering Strategy* 94 tbl. 16 (App. B), *available at*

Section 1956 comes with harsh penalties: a statutory maximum of up to twenty years' imprisonment and a fine of either $500,000 or twice the value of the property involved in the transaction, whichever is greater. Additionally, although the Sentencing Guidelines were amended in 2001 in an effort to "tie[ ] offense levels for money laundering more closely to the underlying conduct," *U.S. Sentencing Guidelines Manual* app. C, amend. 634, reason for amend., Vol. II at 781 (2006), even today money laundering charges can result in a sentence far greater than that for the predicate offense alone when the predicate offense is not a drug trafficking crime. Villa, § 11:30 (Supp. 2006); *see also* Cuellar, *supra*, at 348–49 (2001 Sentencing Guidelines amendments left sentences for money laundering "severe enough that prosecutors and investigators could use money laundering charges as substitutes for underlying predicate offense charges that might be more difficult to prove against particular defendants").[9] Conviction under § 1956 automatically adds two offense levels to the base level offense applicable to the underlying offense,

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http://www.treas.gov/press/releases/docs/nmls.pdf (last visited Dec. 13, 2007) (citing Dep't of Justice Office of Policy and Legislation, Crim. Div. (FY 2004)).

[9] As explained below, even though Petitioner Cuellar's predicate conduct was drug-related, had he been convicted under the bulk money smuggling statute, 31 U.S.C. § 5332 (under which he was not even charged, *see United States v. Cuellar*, 478 F.3d 282, 300 n.10 (5th Cir. 2007) (en banc) (Smith, J., dissenting))—the charge most directly applicable to his conduct—he would have faced a statutory maximum one-fourth that of § 1956.

even if no other sentencing enhancements apply. U.S.S.G. § 2S1.1(b)(2)(B).

In white-collar criminal cases, in particular, the prospect of higher sentences allows prosecutors to extract plea bargains and forfeitures that might not otherwise be forthcoming and that may well not be in the interest of justice. *See* Eric. J. Gouvin, *Are There Any Checks and Balances on the Government's Power to Check Our Balances? The Fate of Financial Privacy in the War on Terrorism*, 14 Temp. Pol. & Civ. Rts. L. Rev. 517, 534–35 (2005) (noting, in the context of anti-money laundering provisions in the USA PATRIOT Act, that "prosecutors have used money laundering violations as a device to leverage up the criminal consequences for regulated behavior, creating incentives for the accused to plea bargain"). Because an indictment with a § 1956 charge risks a heavier sentence than does an indictment (for the same conduct) without such a charge, prosecutors have a great incentive to use it as a bargaining chip in pretrial conferences. The mere threat of a money laundering charge thus can be a powerful weapon in the prosecutor's negotiating arsenal.

This vast increase in potential punishment is entirely unjustifiable if it is not accompanied by greater culpability on the part of the accused—and, specifically, by the culpability that Congress meant to punish when it enacted the statute in the first place (i.e., "traditional" money laundering). Instead, prosecutors and courts have interpreted § 1956 to embrace conduct—as here, "concealment" in an automobile—that comes nowhere close to presenting the dangers to society that the money laundering

statute was designed to address. Defendants, including Petitioner here, should not face enhanced potential sentences for conduct not meaningfully more blameworthy than the underlying predicate offenses.

The continued broad and improper application of § 1956 has real-world consequences for defendants convicted under it, as well as for defendants threatened with money laundering charges. The Fifth Circuit's expansion of § 1956 in this case, if affirmed, would further increase prosecutorial power at the expense of fairness.

II. MANY DEFENDANTS WHO SUFFER OVERBROAD APPLICATION OF § 1956 WOULD BE SUBJECT TO PROSECUTION UNDER OTHER CRIMINAL STATUTES IN ANY EVENT.

If this Court reversed the Fifth Circuit's decision, it would not deprive the government of the means to punish international financial crimes. On the contrary, given the numerous other money laundering statutes, cash reporting statutes, and anti-smuggling statutes,[10] "there is already no

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[10] In addition to §§ 1956 and 1957, these include 18 U.S.C. § 1960 (prohibition of illegal money transmitting businesses); 18 U.S.C. § 982 (criminal forfeiture after conviction under, *inter alia*, §§ 1956, 1957, 1960); 31 U.S.C. § 5313 (reports on domestic coin and currency transactions); 31 U.S.C. § 5316 (reports on exporting and importing monetary instruments); 31 U.S.C. § 5317 (search and forfeiture of monetary instruments); 31 U.S.C. § 5324 (structuring transactions to evade reporting

shortage of *in terrorem* tools at prosecutors' disposal." *Blakely v. Washington*, 542 U.S. 296, 311 (2004).

Petitioner's case is illustrative. As the dissent in the Fifth Circuit pointed out, and as Petitioner himself has conceded, Cuellar's conduct is squarely captured by the bulk cash smuggling statute, 31 U.S.C. § 5332, because he intended to transport cash in excess of $10,000 across an international border without reporting it. *See United States v. Cuellar*, 478 F.3d 282, 299–300 (5th Cir. 2007) (en banc) (Smith, J., dissenting) (explaining that the legislative history of § 5332 demonstrates that Congress did not intend § 1956 to capture conduct such as petitioner Cuellar's). If charged under § 5332, Cuellar would have faced a statutory maximum of five years in prison. Instead, having been accused and convicted of "money laundering," Cuellar was exposed to a twenty-year statutory maximum sentence under § 1956.[11]

* * *

Amicus does not dispute the need for an anti-money laundering strategy, or for an anti-money laundering statutory scheme. Rather, Amicus contends that the breadth of § 1956, as interpreted

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requirement prohibited); 31 U.S.C. § 5332 (bulk cash smuggling into or out of the United States).

[11] Petitioner was sentenced to a term of seventy-eight months, with supervised release of three years immediately following. J.A. 4.

by the Fifth Circuit, does not conform to the language of the statute or to Congress's intent and leads to unintended and unfair results. This Court should therefore reverse the judgment below.

CONCLUSION

For the foregoing reasons, amicus curiae National Association of Criminal Defense Lawyers supports Petitioner Cuellar's request that this Court reverse the judgment of the Fifth Circuit.

Respectfully submitted,

JEFFREY T. GREEN
SIDLEY AUSTIN LLP
1501 K Street, NW
Washington, DC 20005
(202) 736-8000

CRAIG D. SINGER
(Counsel of Record)
JOHN E. CLABBY
CHRISTOPHER R. HART
DAVID A. TAYLOR
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, NW
Washington, DC 20005
(202) 434-5000

Attorneys for Amicus Curiae National Association of Criminal Defense Lawyers.

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